IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 675

JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, Deceased,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,
Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

With due respect petitioner submits that, although respondent has stated numerous propositions and has cited a long series of cases, including many in this Court, in its brief, none of them destroys or impairs the decisive effect in this case of *New England Life Insurance Co.* v. *Woodward,* 111 U. S. 138, and *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, as well as the numerous

Circuit Court of Appeals decisions following them, including *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694, and *London, Paris & American Bank* v. *Aronstein*, 117 F. 601.

Indeed, with the single exception of the *New England Life Insurance Co.* case, respondent fails to consider or even refer to the many decisions cited above and on page 12 of our petition, all of which hold that where a defendant can properly and lawfully be sued by an ancillary administrator in the jurisdiction of his appointment, so that the local court, whether Federal or State, has complete *in personam* jurisdiction over the defendant to enter any proper and lawful *in personaum* decree against the defendant in such proceeding.

This, we submit, is precisely the situation in the case at bar.

I.

Respondent first maintains (p. 15) that the amended and supplemental complaint is ineffective in this cause "because the securities involved in this case have *no situs for administration in Illinois,*" citing Section 55 of the Illinois Probate Act.

We reply to this proposition that Section 55 of the Illinois Probate Act *has no relation whatever* to the situs of tangible personal property "for (purposes of) administration" because Section 55 specifically states that it relates *only* to situs "for the purpose of *granting* administration of both testate and intestate estates of non-resident decedents." In other words, all that this section means and provides is that an Illinois administration can-

not be *founded in the first instance* upon such securities as these *while they are outside Illinois, i.e.,* before they are brought into Illinois. It does not provide that they cannot be administered in Illinois like any other tangible personal property which may be brought, either voluntarily or by suit, into the possession or control of an Illinois administrator. (See cases cited, pages 9-12 and 16-17 of petitioner's brief.)

Obviously the respondent cannot attack (and on page 20 of its brief in the Circuit Court of Appeals in this case *it admitted that it is not attacking*) "the *granting of administration to plaintiff* by the Probate Court of Cook County," "in view of the fact that there was located in Illinois a fund on deposit in a Chicago bank to the credit of the decedent at the date of his death," which the complaint specifically alleges, and respondent likewise admits, "is sufficient basis for the *granting* to him of letters of administration *de bonis non* by the Probate Court of Cook County (Rec. 7)" (p. 3 of respondent's brief below).

Indeed, it has always been held that the appointment of an administrator *cannot be collaterally attacked* in another proceeding.

Northwestern Mutual Life Ins. Co. v. *Johnson,* 275 F. 757.

Rice v. *Metropolitan Life Ins. Co.,* 238 S. W. 772.

Here and elsewhere in its brief (pp. 16, 18, 31) respondent claims that "under Illinois law there is no jurisdiction for the ancillary administrator *to seek to reach out beyond the borders of Illinois* and draw into his possession tangible personal property left by the decedent in New York." This is a "straw man." Petitioner by suing *in Illinois* is not "reaching out beyond the jurisdiction" of the state of his appointment, to wit, Illinois; nor

by suing *in the Federal Court in Illinois* does petitioner ask this Court to assume any "extra-territorial jurisdiction or authority." It is petitioner's whole case, exactly as in the *New England* and *Equitable Life Assurance Society* cases, that by seeking an *in personam* judgment which is *plainly within the jurisdiction of the Federal Court of Illinois*, petitioner is not "reaching out beyond the jurisdiction" or seeking "extra-territorial jurisdiction or authority."

The only authority cited by respondent (pp. 16-17) to support such a proposition is contained in the writings of three law professors and three cases decided in this Court, none of which has the slightest relevancy to this question. On the contrary, the cases we have cited in petitioner's brief (pp. 9-14) are in point and specifically hold that an ancillary administrator may sue to recover any property by an *in personam* decree in any case properly brought against the defendant, in the jurisdiction of his appointment, whether by that decree the defendant is required (1) to pay any money, or (2) to take any action regarding either *real* property, or *tangible or intangible personal* property, even though the carrying out of such a decree would involve doing an act or affecting a thing in a foreign state.

In other words, we have shown in our brief (pp. 9-16) that the Illinois Federal Court in this case *has complete jurisdiction, authority and power* to enter an *in personam* decree against this defendant, which is lawfully admitted to and is doing business in Illinois, in an action such as this which seeks to require the defendant either (1) to pay money or (2) to deliver up securities in its possession or power, regardless of whether the money or securities may come from an account or vault in a Chicago or a New York bank.

II.

Respondent's next proposition (p. 18) is that New York "has an absolute right to administer" the property here involved, and that "this is a *sovereign right inherent* in the state and enables the state *to protect its creditors*, its *taxing authorities* and *those persons* it recognizes as *entitled to inherit*, and in the event of an intestate dying without heirs, *its own right to succeed to the property by escheat.*"

Before pointing out that the authorities cited to support this proposition do not so hold, we show in passing that the sworn complaint in this case alleges (1) that *there are no New York creditors* of this decedent's estate; (2) that *there is no inheritance tax* due in the State of New York; (3) that under New York law the New York courts could *not* determine the succession to this property, but would have to transmit the securities or remit the proceeds of their sale to the domiciliary administrator; and (4) that there are living heirs of the decedent so that *this property could not conceivably pass to the State of New York by escheat* (R. 4-10).

Respondent appears to rely (pp. 18-19) in this connection principally upon the case of *Iowa* v. *Slimmer*, 248 U. S. 115. We submit that this case has no conceivable application to the case at bar. It held that the *State of Iowa* could not sue in *Minnesota* to enjoin the administration of assets which were in the possession of the *Minnesota* administrator. It was not held that if there had been no administrator appointed in Minnesota and if the assets were in possession of a bank or insurance company doing business in Iowa, *an Iowa administrator could not sue to recover the securities or their value in money in a suit brought not in Minnesota, but in Iowa.*

In the *Slimmer* case the State of Iowa sued in the State of Minnesota, while in the case at bar the Illinois administrator (not the State of Illinois) is suing in the Illinois courts. There is no parallel whatever in these two situations. To make the *Slimmer* case applicable, the State of Illinois, not petitioner, would have to be suing in the present case *in the New York court to prevent New York from administering these securities.* The State of Illinois is making no such effort, nor is there any New York administrator who is in possession and resisting any such claim.

As for the cases cited on page 20 of respondent's brief, *In re Cornell's Will,* 267 N. Y. 456; *Tilt* v. *Kelsey,* 207 U. S. 43; and *Helme* v. *Buckelew,* 229 N. Y. 363, related only to the issue of *decedent's domicile,* as did the cases of *Overby* v. *Gordon,* 177 U. S. 214, and *Riley* v. *New York Trust Co.,* 315 U. S. 343; and *Higgins* v. *Eaton,* 202 Fed. 75, had to do only with *the decedent's testamentary capacity.* These cases have nothing whatever to do with the suit at bar in which *neither domicile nor testamentary capacity* is involved. They merely held that a decision as to *domicile* or *testamentary capacity* in one jurisdiction is not binding throughout the world under the doctrine of *res judicata,* which is irrelevant here. The meaning and effect of these cases is that the courts of each state can adjudicate all issues *in personam* between any parties subject to its *in personam* jurisdiction. In other words, it is jurisdiction *in personam* over the respondent, rather than jurisdiction over the securities *in rem,* which the Federal court is asked to take in this case.

Respondent says (p. 21) that "Respondent owes the decedent's estate no money." The complaint in this case seeks a money judgment as well as possession of the securities (R. 11).

Respondent also says (p. 21) that "there is absolutely *no point of contact* between these securities and the State of Illinois." Yet in its brief in the Circuit Court of Appeals (p. 43), respondent admitted that: "It is perfectly true that had he (decedent) in his lifetime brought an action in the courts of Illinois to recover possession of these securities defendant (respondent) would have had to surrender them to him." Clearly there is exactly the same "point of contact" between respondent and the decedent in his lifetime as between respondent and his Illinois ancillary administrator after his death. That "point of contact" is the respondent itself, which is doing business in Illinois and which has duly appointed an Illinois agent upon whom jurisdiction *in personam* can be had, and which is thereby rendered fully subject to the Illinois Federal Court's jurisdiction in this case. That was the situation in each of the cases cited on pages 9-13 of our brief, in each of which the local administrator (whether ancillary or domiciliary) was held entitled to sue and procure any *in personam* relief against any defendant amenable in the local courts to an *in personam* decree.

Actually respondent has confessed its case away, we submit, in the following statement on page 23 of its brief:

> "*We readily concede* that in a proper case an equity court may enter a decree *in personam* affecting *property not within its jurisdiction.* But such a decree, to be proper, can only be for the enforcement of the rights of the person lawfully entitled to such property. *We likewise concede that where a bailee wrongfully withholds property from its true owner, an action of detinue will lie, leading to a money judgment,* but this is only true when property is withheld from the proper owner." (Italics added.)

Respondent then goes on to maintain that "the Probate Court of Cook County was entirely without juris-

diction" to award a right to the property to the petitioner in this case by a decree *in rem*. The argument is that the *New England Life Insurance Co.* case does not apply because in that case an *in personam* decree was sought, whereas in the case at bar an *in rem* decree is sought. The argument (pp. 23-4) proceeds upon a misunderstanding of the decree sought in this case. An examination of petitioner's complaint shows clearly that he is seeking only *in personam* relief; and in arguing that petitioner seeks an *in rem* decree, which is impossible in a law action *in detinue* such as this, the respondent is simply changing the entire basis of the proceeding to suit its own purposes in attempting to defeat the uniform rule announced in the *New England Life Insurance Co., Equitable Life Assurance Society,* and other Federal cases cited in our petition.

"The true rule" urged by respondent (p. 22) is as follows:

> "The true rule is that in no matter how many states and foreign countries this respondent can be found by the service of process upon its agents, nevertheless the one *and the only state* which has jurisdiction to administer upon these kaffirs left in its custody by a person subsequently dying is the state where such kaffirs are physically located. That state is New York." (Italics added.)

A moment's consideration will show that this certainly cannot be "the true rule" because of its possible consequences. Let us suppose that the respondent actually held these securities in its possession and control in any state in which it was *not* actually doing business and where, therefore, *it could not be effectively sued.* If the "true rule" were that enunciated by respondent, these securities could not then be administered *anywhere.* In that sit-

uation a local administration in such state would not result in the local administrator getting possession of the securities unless they were voluntarily surrendered, since the respondent holding their possession could not be effectively sued in that state; and under this asserted "true rule" it could also not be sued *to deliver these securities or their value to the local administrator* in any other state.

In other words, under this so-called "true rule," if no administration of these securities were possible in New York, as might easily occur in another case if the defendant did no business there, the securities would be forever lost to the decedent's estate. Clearly if they were concealed in respondent's vault in some state in which it was not doing business, no *in rem* proceeding could locate them, and the respondent could not be compelled to produce them for administration voluntarily.

Moreover, any such "true rule" as is here enunciated would tend to multiply beyond all reason the unnecessary and expensive ancillary administrations of decedents' estates in the forty-eight States of the Union, as we show more fully below.

If the tables were turned and in this case a New York ancillary administrator were suing an Illinois bank doing business in New York, it takes little imagination to envisage the vigor with which the New York court would assert its right to administer these securities if it had, as in this case, full *in personam* jurisdiction over the defendant, *regardless of where the securities might actually lie.*

In other words, we submit, the doctrine of the *New England Life Insurance Co.* and the other Federal cases, which has been unimpaired in both the Federal and State

Courts for more than half a century until the decision in this case, should not be upset, especially when the result would be to cause useless and expensive administrations of decedent's estates in a country where, as in the United States, there are forty-eight possible jurisdictions for probate administration of any decedent's estate.

If ever public policy required that a clear decision on this important issue in probate law be decided by this Court, we believe it is in this case.

III.

1. Respondent next replies (p. 24) to the cases cited in our brief (pp. 16-17), all holding that respondent cannot be subject to double liability if it be required by an effective *in personam* decree in this case in Illinois to turn these securities over to the Illinois administrator.

Respondent replies to these cases by claiming (pp. 24-5) that it would be held doubly liable on account of delivering up these very assets because "respondent might later be held liable in some New York court, whether at the suit of the decedent's New York heirs, if any, the New York State Tax Commission, other and now unknown New York creditors, or any other persons who might ultimately be held by a court of New York to have an interest in the decedent's New York estate."

We wonder why the respondent ignores the cases holding directly to the contrary in our brief. Moreover, we have shown that the complaint itself specifically alleges (1) that the only New York heir has, in effect, consented to a decree in favor of petitioner in the Federal Court in Illinois; (2) that there are no New York State succession taxes due on this estate, because the decedent was a non-

resident and the property is personal property, not real estate; and (3) that there are no other New York creditors having an interest in the decedent's New York estate (R. 7-11). Thus even if a decree in the Federal Illinois Court could be collaterally attacked, which is denied by every one of the cases cited on pages 16-17 of our petition, there are in this case no persons who could make such an attack in existence.

2. Respondent next devotes several pages (25-7) to the contention that: "Under New York law probate administration is commenced and the Surrogate's Courf acquires jurisdiction as soon as an application for letters has been filed and prior to the appointment of an administrator," citing a long list of Surrogate's Court decisions.

But on page 4 of its brief respondent admits that "*application for letters* (in the New York Surrogate's Court in this estate) was *denied* on November 27, 1941." Moreover, none of the cases cited have any applicability to the case at bar. None of these cases holds that an estate is "pending" in the Surrogate's Court of New York in the sense involved in this litigation in Illinois, to wit, by the appointment of an administrator or by the taking of possession of the securities in question. Every one of respondent's cases holds that *in the race between the several Surrogates' Courts of the various New York Counties* to administer a decedent's estate, the one in which a petition is first filed takes precedence over the others under the local New York statute.

That this is merely a question of local New York law, without any significance in this case, is clearly shown by Section 45 of the Surrogate's Court Act cited (p. 26) by respondent, which states that the Surrogate's Court in New York acquires exclusive jurisdiction of an estate

only when "letters testamentary or of administration *have been duly issued*" by that Court. *That is not the situation here.* For example, in *Matter of Feinberg,* 280 N. Y. S. 540, cited on page 26 of respondent's brief, it was not merely the filing of the petition but the *exercise of jurisdiction* by the Surrogate's Court of New York County which excluded the subsequent *exercise of jurisdiction* by the *Surrogate's Court of King's County.*

Clearly the Surrogate's Court of New York having *denied* the application for letters on November 27, 1941, and *said proceeding having been in fact abandoned,* as alleged in the complaint, without the appointment of any representative of the estate in New York (R. 10), it is plain that respondent's contention that the Surrogate's Court of New York has obtained exclusive jurisdiction *in rem* over these securities by the appointment of an administrator cannot be sustained.

3. In answer to petitioner's contention that an ancillary administration of these securities in New York would be "utterly useless and wasteful of the assets concerned," respondent asserts (pp. 27-32) (a) that the New York Surrogate's Court has "complete power to distribute an ancillary estate in New York directly to beneficiaries without transmission to the domiciliary administrator"; (b) that the New York Surrogate's Court "has complete power in the administration of an ancillary estate to direct the payment of the claims of the decedent's non-resident creditors"; (c) that the jurisdiction of the New York Surrogate's Court "does not depend upon the presence or absence of creditors in New York"; and (d) that Judge Cardozo's opinion, in *In re Martin's Will,* 255 N. Y. 359, does not hold that "the policy of the New York courts is opposed to useless and wasteful duplication of administrations."

We reply to these propositions in a few words as follows:

A. The cases cited for the proposition that the New York Surrogate's Court can distribute an ancillary estate directly to beneficiaries without transmission to the domiciliary administrator, cited on page 28 of respondent's brief, *do not support this proposition except where all the legatees or other distributees are in New York,* which is not the situation in this estate since it is alleged that the decedent left distributees and possible heirs in France, Brazil and Morocco (R. 37).

The New York courts have repeatedly held, as we show on page 19 of our petition, that it is only (1) where all of the next of kin reside in New York and (2) where the rule of distribution in New York is identical with the rule of distribution in the domiciliary administration, that distribution will be permitted in New York (see cases cited, page 19 of our petition). Both of these requirements are negatived by the sworn allegations of the complaint in this case directly to the contrary (R. 5, 8).

B. Respondent's argument that the New York Surrogate's Court has complete power to direct the payment of the claims of the decedent's non-resident creditors is both irrelevant and unsupported by the cases cited (p. 29) in respondent's brief. In the *Van Bokkelen's Estate* case, the New York Surrogate's Court permitted a New York ancillary administrator to pay a *preferred New York creditor* of an insolvent estate in full; and in the *Hopper* case the Court of Appeals of New York held that the New York Surrogate could pay a non-resident creditor *provided the cause of action arose in New York State.* Neither of these situations exists in the case at bar; and in many other decisions the New York Surrogates have flatly

refused to pay non-resident creditors. For example, *In re Meyer's Estate,* 211 N. Y. S. 525, aff'd in 244 N. Y. 598, held that an Illinois creditor was properly denied the right to file his claim in an ancillary estate in the New York Surrogate's Court, but would have to go to the domiciliary administration *in Australia* for collection. In this case Surrogate Foley said (p. 528):

> "The purpose of ancillary administration and the distribution of assets here (in New York) is *primarily for the protection of New York creditors* and *New York beneficiaries* of an estate."

C. Petitioner cited in his brief (p. 18) five cases in the Supreme Courts of five different states (including New York) holding that *no ancillary administration is proper* in any state *in the absence of local creditors* in that state. Not only does the complaint herein squarely allege that *there were no New York creditors to justify a New York ancillary administration in this case,* but also that there were no inheritance, succession or other taxes due in New York upon these assets (R. 7-9).

On this crucial subject all that respondent has to say is contained in the single sentence following:

> "It is notable that of five cases cited by petitioner on this point only one is a New York case and this does not support him (Petitioner's Brief, 18)."

This is strictly inaccurate. Not only do *each of the decisions in the Supreme Courts of Minnesota, New Jersey, Wisconsin and Illinois* support the proposition that *in the absence of local creditors no ancillary administration is proper,* but also the New York case of *In re Meyer's Estate,* 211 N. Y. S. 525; aff'd in 244 N. Y. 598, as shown above, holds that "the purpose of ancillary administration and the distribution of the assets here (in New York)

is *primarily for the protection of New York creditors* and *New York beneficiaries* of an estate."

In other words, *the unquestioned rule of law* governing the administration of all decedents' estates in the United States is that *in the absence of local creditors there shall be no useless and expensive local ancillary administrations.* It is precisely *to compel such a useless and expensive local ancillary administration in New York* that respondent here, which is a mere bank custodian of the decedent's securities here involved, is resisting the entry of an *in personam* order which is admittedly within the Federal Court's jurisdiction in Illinois in this case, and which would completely protect it from any liability in the future in any other proceeding.

D. Finally the respondent's statement that Judge Cardozo did not in his opinion in *In re Martin's Will,* 255 N. Y. 359, decide, as petitioner contends, that a useless and expensive ancillary double administration should be avoided, is incorrect. On page 31 of its brief respondent quotes from Judge Cardozo's opinion the very language in which he cited with approval the case of *State of Colorado* v. *Harbeck,* 232 N. Y. 71, and held that New York would refuse to remit the local assets to a foreign state "since compliance with the demand *would result in a depletion of the assets by the unnecessary expenses of a double administration,*" especially where the local ancillary administration had "conveyed repeated offers to the taxing officers in Connecticut (the foreign state) to make payment of any tax found owing" there, exactly as petitioner has offered in this case to pay any succession taxes due in New York (R. 7-8). Judge Cardozo then continued: "What he (the New York ancillary administrator) refused was *a wasteful duplication of administrations and accountings.*"

If this is not a strong decision that *a useless and wasteful duplication of administrations should be avoided under such circumstances as are alleged in this case,* then we do not understand Judge Cardozo's clear language to that effect which he twice repeated.

Conclusion

Petitioner urges that there is nothing in respondent's brief which shows any want of authority in the Federal Court in Illinois to enter a valid order or decree *in personam* requiring respondent either to turn over the securities sued for or to pay a money judgment for their monetary value. Nor does the respondent show that the unchallenged rule of law established in the New England *Life Insurance Co.* and *Equitable Life Assurance Society* cases, consistently followed by the Circuit Courts of Appeals for half a century until the decision in this case, should not be applied here to prevent a useless and expensive ancillary administration in New York which would serve no conceivable purpose, there being no New York creditors and the New York Surrogate's Court having no power over these assets except to transmit them for final administration to some as yet undetermined court outside the United States of America where Illinois creditors would need to follow.

For this reason petitioner submits that the petition for a writ of certiorari should be allowed.

Respectfully submitted,

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